Office-Supreme Court, U.S.
FILED
MAY 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,

Petitioners,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Interest of the Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

*Letters of consent from both parties to the filing of this brief have been lodged with the clerk of Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

Amicus has a deep interest in the question of the standards by which counsel fee determinations should be made, both as those standards affect the Fund directly

and as they affect private attorneys. In virtually all of the Fund's cases it is associated with attorneys in private practice, mostly in small firms. Our experience establishes that awards of adequate attorneys' fees are absolutely essential for the continuing participation of such attorneys in the enforcement of civil rights. For these reasons, amicus has participated in many of the leading cases involving attorneys' fees questions, both as counsel, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S. 678 (1978); and Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974), and as amicus curiae, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Hensley v. Eckerhart,

461 U.S. 424 (1983); Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891 (1984); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

SUMMARY OF ARGUMENT

Certiorari should be granted because of the deleterious impact of the decision below on the private enforcement of the civil rights laws. The decision's mechanical equation of an attorney's billing rate with his or her market rate would penalize attorneys who are willing to take on civil rights cases at reduced fees. It would particularly affect those firms which have public interest litigation as a major portion of their practice. The decision is in conflict with this Court's decision in Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891 (1984), with the decisions of other circuits, and with the

intent of Congress when it enacted the various civil rights fees statutes.

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THE CASE RAISES ISSUES OF CRUCIAL IMPORTANCE TO THE PRIVATE ENFORCEMENT OF THE CIVIL RIGHTS LAWS.

As explained in the statement of interest, the NAACP Legal Defense Fund, in common with other national public interest lititation organizations, depends heavily on the efforts of attorneys in private practice for the carrying out of its program. Thus, although the decision below, which holds that attorneys employed by public interest organizations can receive a full market rate, would not affect the fees recovered by the Fund itself, it would have a devastating effect on the Fund's ability to enlist private attorneys to carry out its mission of

providing legal assistance to persons unable to pay attorneys' fees. This result follows from the decision of the court below on both the issue of computation of the lodestar rate and the issue of the allowance of a contingency adjustment to take account of the risks of such litigation.

The impact of the decision below has already been felt in the District of Columbia. To amicus' knowledge the number of attorneys in small and single practitioner firms who can continue to take on the representation of the average civil rights plaintiff has been seriously affected by the Laffey decision. Attorneys have been forced to restrict their civil rights practice to those few clients who can afford to pay a full market rate. They are economically unable to continue

their prior practice of billing civil rights clients either not at all or at a reduced rate, since under the decision below such practices would establish what they may receive by a court.

We urge that the petition for a writ of certiorari should be granted because the decision of the court below is fundamentally inconsistent with the decision of this Court in Blum v. Stenson, ____ U.S. _____, 79 L.Ed.2d 891 (1984), with the decisions of virtually every other court of appeals, and with the legislative history and purposes of the various civil rights attorneys' fees statutes.

The decision below would establish two categories of civil rights practitioners, one favored and one disfavored. The favored category would consist of

firms with high billing rates and clients able to afford those rates and public interest organizations, which would be able to use the same high billing rates to establish the market value of their attorneys' work since they have no billing practices of their own. The disfavored category would consist of the firms that handle the bulk of civil rights cases, particularly individual employment discrimination cases on behalf of single employees.

Firms engaged in active civil rights practice, with whom amicus works throughout the country, must of necessity charge their clients less than a fair market rate because the ordinary plaintiff, even one with an income in the mid-ranges, simply cannot afford to pay fees at market rates. Take, for example, a Title VII plaintiff

challenging illegal discrimination in the form of the denial of a promotion with a case that must go through the administrative process and trial in district court in order to obtain full injunctive and back pay relief. Such litigation can easily result in attorneys' fee in excess of $50,000. Given the risk of losing, it would simply not make economic sense for such a plaintiff to pay an attorney at a full market rate.

Thus, it is common for attorneys who have regular civil rights practices to represent clients at no charge at all or to bill out at a rate substantially lower than that they could receive from the market in other types of cases. The remainder of the fee is contingent on success at trial. Hence, to equate the attorney's <u>billing</u> rate with his or her

market rate is simply wrong. To do so, moreover, imposes a penalty of the severest kind upon attorneys willing to risk receiving little or no fees in order to do precisely what Congress intended, viz., represent persons who otherwise would be financially unable to pursue their civil rights claims.

Even when a firm has a substantial commercial practice the mechanical equation of its billing rates in that type of case with a proper market rate for contingent-fee, complex federal litigation is inaccurate. In the ordinary commercial practice a firm will bill out and get paid on a current basis regardless of the outcome of the litigation. Consequently, those billing rates will not provide adequate compensation for contingent fee litigation, for they do "not take into

account the loss in value of money because of inflation or the loss of the use of the money because of delay in payment."[1] As the Fifth Circuit has succinctly put it:

> Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result. This is neither less nor more appropriate in civil rights litigation than in personal injury cases. The standard of compensation must enable counsel to accept apparently just causes without awaiting sure winners.

Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc).

Again, the purpose of the fees acts -- to encourage attorneys to take on these complex and lengthy cases -- must control. If effective rates in commercial litigation are higher because fees are received

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[1] "Counsel Fees in Public Interest Litigation", Report of the Committee on Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300, 318 (1984).

on time and without risk, "there will be a negative incentive to move away from civil rights litigation and to concentrate efforts on more profitable aspects of the practice."[2] See Vulcan Soc'y v. Fire Department, 533 F. Supp. 1054, 1066 (S.D.N.Y. 1982).

Blum v. Stenson, supra, and the decisions from the other circuits discussed in the petition at pp. 18-19, are inconsistent with the result the court below reaches. Those decisions simply state the proposition that billing rates can provide a convenient starting point, and "may afford relevant comparisons" (79 L.Ed.2d at 900, n. 11 (emphasis added)). They do not hold that billing rates will

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[2] "Counsel Fees In Public Interest Litigation", op. cit. supra n. 2, p. 326. As the report notes, a number of district courts, as well as the Association of the Bar itself, have found it necessary to establish special programs to encourage the private bar to take on civil rights cases. Id. at 326-27. This is at the same time when the need for private enforcement has become all the greater. Id. at 324-26, and notes 171-175.

absolutely fix the amount to be awarded. As we have discussed above, unless the billing rates are for comparable, i.e., contingent and complex, litigation, and are equivalent to those that would be charged to clients financially able to pay the full amount on a monthly basis, they do not establish the market value of the attorneys' services simply because the attorney is with a for-profit firm.

In sum, the inevitable consequence of the decision below would either make it financially impossible for the great majority of civil rights plaintiffs to pursue their claims or would drive attorneys out of civil rights practice in even greater numbers than at present. Congress, however, intended to facilitate the creation of an expanding and active civil rights bar comparable to the bar

that eagerly takes on anti-trust and securities cases. See S. Rep. No. 94-1011 (94th Cong., 2d Sess., 1976), pp. 5-6.

The message sent by the decision below, however, is quite different than that intended by Congress.[3] It says to practitioners who are active in civil rights cases to stay away from such cases, except in the rare instance when they are lucky enough to find a client able to play a full fee every month, and to concentrate on representing regular commercial clients. Amicus can assure the Court that that message has been received and understood by the private bar; we urge in

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[3] In this regard, it is troubling that the decision below relies, in part, on a report to Congress of the National Association of Attorneys General, whose stated purpose is to convince Congress to amend the civil rights statutes to reduce the level of fees. 746 F.2d at 12. The NAAG report sets out a number of purported reasons why the fee statutes should be amended to produce lower fees. For a contrasting exposition of the present state of the law and a discussion of why it should not be changed we refer the Court to the recent report of the Association of the Bar of the City of New York cited in note 1, supra.

the strongest terms that review of the decision below is essential to prevent the private enforcement of the civil rights acts from being further undermined.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the decision of the court below should be reversed.

Respectfullly submitted,

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